

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CHRISTOPHER A. JONES,

Plaintiff,

v.

HOWARD SKOLNIK, et al.,

Defendants.

3:10-cv-00162-LRH-VPC

ORDER

Before the court is the Report and Recommendation of U.S. Magistrate Judge Valerie P. Cooke (#72¹) entered on November 2, 2011, recommending that Defendants' Motion to Dismiss (#44) filed on April 12, 2011, be granted as to Defendant Janet Traut and be denied as to Defendant Melanie Mason. Defendants filed their Partial Objections to Magistrate Judge's Report and Recommendation (#79) on November 18, 2011. Plaintiff filed his Objections to Magistrate Judge's Reports and Recommendation (#80) on November 18, 2011. Defendants filed a Response to Plaintiff's Objections (#84) on December 1, 2011. This action was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 1B 1-4 of the Rules of Practice of the United States District Court for the District of Nevada.

The court has conducted its *de novo* review in this case, has fully considered the objections of

¹Refers to court's docket number.

1 the Plaintiff and Defendants, Defendants' response, the pleadings and memoranda of the parties and
2 other relevant matters of record pursuant to 28 U.S.C. § 636 (b) (1) (B) and Local Rule IB 3-2. The
3 Court determines that Defendants' Partial Objections (#79) to the Magistrate Judge's Report and
4 Recommendation (#67) entered on October 20, 2011, should be sustained and the matter referred to
5 the Magistrate Judge for reconsideration on the merits of Defendants' motion to dismiss Count V
6 against Defendant Melanie Mason. In all other respects, the court determines that the Magistrate
7 Judge's Report and Recommendation (#72) entered on November 2, 2011, should be adopted and
8 accepted.

9 The recommendation to deny Defendants' motion to dismiss Count V against Defendant Mason
10 is based on the determination that Defendants had failed to submit any properly authenticated evidence
11 in support of their motion, despite the fact that Defendants relied on exhibits that are attached to
12 Plaintiff's amended complaint. This determination is erroneous. "A copy of a written instrument that
13 is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c).
14 Accordingly, in ruling on a motion to dismiss, a court may consider not only the allegations contained
15 in the pleadings but also "exhibits attached to the complaint, and matters properly subject to judicial
16 notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Moreover, in order to prevent
17 plaintiffs from avoiding dismissal "by deliberately omitting references to documents upon which their
18 claims are based," the court may also consider documents not physically attached to the complaint if
19 (1) the documents' authenticity is not contested, and (2) either the allegations of the complaint
20 "explicitly incorporate[]" the documents' contents, or the complaint "necessarily relies" on the
21 documents, in that they are "crucial" or "essential" to the plaintiff's claims. *Parrino v. FHP, Inc.*, 146
22 F.3d 699, 705-06 (9th Cir. 1998) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)). Here,
23 because the exhibits in question were attached to Plaintiff's amended complaint, they are considered
24 a part of the pleadings and are therefore properly considered on a motion to dismiss without further
25 authentication.

1 IT IS THEREFORE ORDERED that Defendants' Partial Objections (#79) to the Magistrate
2 Judge's Report and Recommendation (#72) entered on November 2, 2011, is hereby sustained, and the
3 matter is REFERRED to the Magistrate Judge for reconsideration of Defendants' Motion to Dismiss
4 Count V (#44) against Defendant Melanie Mason.

5 IT IS FURTHER ORDERED that in all other respects the Magistrate Judge's Report and
6 Recommendation (#72) entered on November 2, 2011, is adopted and accepted, as follows:

7 IT IS ORDERED that Defendants' Motion to Dismiss Count V (#44) against Defendant Janet
8 Traut is GRANTED, and Count V against Defendant Traut is DISMISSED with prejudice.

9 IT IS SO ORDERED.

10 DATED this 11th day of January, 2012.

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14 LARRY R. HICKS
15 UNITED STATES DISTRICT JUDGE
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